



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: McDonald-Bradley

File: B-270126

Date: February 8, 1996

Keith L. Baker, Esq., and Jeffrey Weinstein, Esq., Eckert, Seamans, Cherin & Mellott, for the protester.

Michael D. Zeiders, for Zeiders Enterprises, Inc., and Steven Sarfatti, Esq., Schwalb, Donnenfeld, Bray & Silbert, P.C., for Technical Assistance and Training Corp., the intervenors.

Herman Narcho, Esq., Department of Labor, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency may award contract to offeror whose proposal indicated that its price was based on wage rates below Service Contract Act wage determination levels where the proposal does not take exception to solicitation requirement that employees be paid in accordance with the Act.
 2. Protest that agency misled protester during discussions is denied where protester has not demonstrated a reasonable possibility that it was prejudiced.
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DECISION

McDonald-Bradley protests the award of contracts to Technical Assistance and Training Corporation (TATC) and Zeiders Enterprises, Inc. under request for proposals (RFP) No. 95-32, issued by the Department of Labor (DOL) for management services, curriculum development, training, and automated management system development. McDonald asserts that the awardees' proposals improperly were based on wage rates below those required and that the agency conducted misleading discussions.

We deny the protest.

The RFP contemplated the award of a time-and-materials, labor hour contract for a base year with three 1-year options. The RFP listed the categories of personnel that would be required under the contract, and estimated a minimum and maximum number of hours that each labor category would be required to perform. The price evaluation was to be based on the maximum number of hours estimated for each labor category. Offerors were to propose hourly rates for each class of employee.

With the exception of certain costs such as travel, which were to be reimbursed separately, the proposed hourly rates were to include all costs and profit. Offerors were also required to support their labor rates with detailed breakdowns that included indirect and direct labor costs and profit. The solicitation incorporated provisions implementing the Service Contract Act of 1965 (SCA), requiring the contractor to pay covered employees in accordance with a wage determination that was included in the solicitation. The solicitation indicated which classes of employees were covered by the SCA, and by which wage determination category they would be covered. Up to three contracts were to be awarded to offerors submitting the proposals most advantageous to the government, based on cost and technical factors.

Seven offerors responded to the solicitation. After evaluating the initial proposals, holding two rounds of discussions, and requesting, receiving and evaluating two rounds of best and final offers (BAFO), the agency awarded contracts to Zeiders and TATC, the offerors with the highest technical scores and the lowest prices. This protest followed.

McDonald maintains that the awards were improper because Zeiders's and TATC's proposals indicated that they intended to pay wages lower than the minimums specified in the wage determination for the database administrator (DBA) technician and the applications programmer analyst.

This argument is without merit. A contracting agency properly may award a contract to an offeror whose proposal indicates that its price is based on hourly rates below the SCA wage rates so long as the offeror does not take exception to the terms of the solicitation, such that it will be obligated under the contract to pay the applicable SCA wage rates to employees. See PRC/VSE Assocs. Joint Venture, B-240160 et al., Oct. 30, 1990, 90-2 CPD ¶ 348; NKF Eng'g, Inc.; Stanley Assocs., B-232143; B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497. There is nothing in TATC's or Zeiders's proposals that takes exception to the SCA requirements. Zeiders's proposal did state that the two employees in question were professional employees that it believed were exempt from the SCA, but the agency had specifically advised all offerors during discussions to provide such an explanation if proposed personnel were believed to be exempt from the SCA. Thus, Zeiders's statement was not an exception to SCA requirements--the statement did not indicate that Zeiders would not pay wages as required by the SCA if the DOL ultimately disagreed with Zeiders.¹ Rather, the statement was an explanation, as requested by the agency, as to why the

¹Whether TATC and Zeiders ultimately perform in compliance with the SCA is a matter for consideration by the DOL, the agency charged with responsibility for enforcing and administering this contract and the SCA. NKF Eng'g, Inc.; Stanley Assocs., supra.

lower wages for the two employees were not inconsistent with SCA requirements. Thus, the awardees' proposals could not be considered unacceptable by virtue of their low labor hour rates.

McDonald argues that, at a minimum, the agency misled the firm during discussions into believing that its proposed wages had to be consistent with SCA wages, and that it was prejudiced because it actually raised its rates for the DBA analyst and applications programmer analyst categories in response to the discussions.

Even if the agency did mislead McDonald during discussions, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Marwais Steel Co., B-254242.2; B-254242.3, May 3, 1994, 94-1 CPD ¶ 291.

McDonald has not met this burden. The difference in cost between McDonald's (\$3,521,771) and TATC's (\$3,053,167) proposals was \$468,604, and between McDonald's and Zeiders's (\$3,340,632) proposals, \$181,139. Our calculations show that the difference between McDonald's rates for the two labor categories in its initial proposal (which were below the SCA rates) and its second BAFO (which were at SCA levels) represents only \$20,705. There is no reason to believe, and McDonald does not state, that it would have lowered its wages for these labor categories further in its BAFO had the discussions not been what they were. Since even with this adjustment to McDonald's price TATC's and Zeiders's prices would have remained low by a substantial amount, there is no basis for concluding that McDonald may have been prejudiced by any misleading discussions.²

The protest is denied.

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²McDonald also argues that it was misled during discussions because Zeiders, but not McDonald, was told to use 0 percent as the overhead rate for its project manager. McDonald argues that had it been given this advice it would have lowered the overhead rate for its project manager. There is no indication, however, that this advice was generic, rather than tailored to Zeiders's proposal. In any case, here too the price impact of this reduction would not have changed the outcome.